No. 89-678

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

DEAN POLING,
Petitioner,

vs.

ELLIS MURPHY, BARBARA OLLIS, ALTA EDWARDS, RONALD WILCOX, UNICOI COUNTY BOARD OF EDUCATION, KENNETH LEWIS, DORIS HENSLEY, GARLAND EVELY, GLENN HOWARD, PAUL MONK, CAROLYN SEELEY & W.A. WILSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The respondents submit that an accurate statement of the question presented for review is: Whether a high school student's campaign speech given as part of a school-sponsored activity that is facially disrespectful to the school administration's authority is protected by the First Amendment to the United States Constitution?

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STATEMENT OF THE CASE

The respondents assert that the petitioner's "statement of the case" omits information which causes it to be incomplete and therefore misleading in the following respects:

Dean Poling asserts that he was reprimanded by Principal Murphy and not given an opportunity to respond to the reprimand. The petitioner omits that he did respond by stating: "I am sorry [you didn't like it] but it got me votes." Also, Dean Poling offered to apologize to Assistant Principal Davidson.

Dean Poling asserts that he and his father met with the advisor, principal and superintendent after the decision had been made to remove him from the race, that they encouraged the Polings to seek review by the local school board and that upon advice of counsel, the superintendent cancelled the hearing and declined to reschedule it. The petitioner omits that in this initial meeting, Mr. Poling told his son that he had done wrong, that Dean Poling was reminded that he had been reprimanded the year before for giving a racially derogatory speech, that school officials met with or called Mr. Poling on six other occasions, and that Mr. Poling attended a school board meeting at which he failed to exercise his opportunity to speak—all of which occurred before counsel for the Board advised the superintendent to decline to give the Polings an opportunity for further hearing.

The petitioner asserts that the district court failed to act on his motion to strike inadmissible portions of affidavits, that the district court granted summary judgment and then denied the motion to strike because it was moot. The petitioner omits that the district court held that the motion to strike was moot because the portions of the affidavits at issue were not relied upon in the court's ruling.

The petitioner asserts that the district court granted the respondent's motion to reconsider despite no new information being submitted to the court. The petitioner

omits that the court initially denied respondent's motion for summary judgment on the issue of due process because of the petitioner's representation that the draft of the speech had been reviewed by the advisor, that Dean Poling had been instructed to make certain changes, that he had made those changes and therefore, he could not have known that he would be punished for his conduct. Petitioner omits that the respondents apprised the court in their motion to reconsider that Dean Poling also added the offensive language concerning Assistant Principal Davidson to the revised speech, that no school official reviewed the revised speech and that Dean Poling could reasonably have known that he would be punished for his impertinent remark.

The petitioner asserts that the Sixth Circuit never addressed the material factual issues presented by the opposing affidavits. The petitioner omits that the Sixth Circuit stated at footnote 1: "In a motion to strike portions of the defendants' affidavits, plaintiff Poling contended that this and other passages in the affidavits constituted inadmissible hearsay. The contention has no merit, and the district court did not err in failing to grant the motion." *Poling v. Murphy*, No. 88-5538, at 4 (6th Cir. April 18, 1989) (17a).[1]

The petitioner asserts that the Sixth Circuit focused on its mistaken impression that the proper recourse of the petitioner would be to seek redress from the local board of education, instead of the district court. The petitioner omits that the court held that Dean Poling had not shown he was entitled to due process under the Fourteenth Amendment.

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[1] The reference(s) to a page followed by an "a" is to the Appendix in the petition for certiorari.

ARGUMENT

I. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED SUPREME COURT PRECEDENT.

Introduction

The question presented for review is whether the law of *Tinker, infra,* or *Hazelwood, infra,* applies to the facts of this case.

Tinker Facts

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) involved students who protested the Vietnam War by wearing black armbands to school, despite the fact that school authorities had passed a policy forbidding the wearing of armbands on campus. *Id.* at 504. The Court found that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment." *Id.* at 505.

However, the Court also found that: "[this] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." [Citations omitted] *Id.* at 507.

These findings pose a dilemma in determining the First Amendment rights of a student versus the right to control conduct in our schools. *Id.* at 507. This Court held that to constitutionally prescribe the expression by a student that the school must be able to show "that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

The school officials in *Tinker* had never alleged that the wearing of armbands caused a disruption, there was no proof it caused a disruption and the school officials did not purport to prohibit the wearing of other political symbols—such as political buttons or even the Iron Cross, traditionally a symbol of Nazism. *Id.* at 510. Therefore, the Court held that under these circumstances, our Constitution does not permit the school to prohibit the student's expression. *Id.* at 514.

Hazelwood Facts

Hazelwood School District, et al v. Kuhlmeier, et al, 484 U.S. _____, 98 L. Ed. 2d 592 (1988), involved censorship of articles written by students in the school newspaper, Spectrum. Spectrum was written and edited by the Journalism II class at Hazelwood East. The board of education allotted funds for the printing of Spectrum. The teacher who taught the course resigned on April 29 and the final edition for the school year was scheduled to be published on May 13. Another teacher was named advisor to the school paper for the remaining weeks of the term. On May 10, the teacher delivered proofs of the May 13 edition to the principal who objected to two articles—one on student pregnancy and the other on the impact of divorce of students at school. *Id.* at 600.

The principal objected to the pregnancy article because, although the girl's names had been changed, he thought the girls would still be identifiable and that the references to sexual activity and birth control were inappropriate for some of the younger students. With respect to the article on the impact of divorce, the principal thought that the parents should be given an opportunity to respond or consent to the publication. *Id.* at 601.

The Court found that the principal reasonably believed that either the pages on which these articles were printed had to be deleted or that the newspaper would not be published at all. The Court held that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. *Id.* at 608.

Which Standard Applies

This Court in *Hazelwood* acknowledged that:

> [T]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> *Id.* at 605.

Did Dean's speech "happen to occur on the school premises" or was it part of "a school-sponsored activity?"

Dean Poling was running for president of the student council. Each of the students was required to obtain a requisite number of signatures on a petition before becoming candidates, they were instructed on the availability of certain portions of the school for campaign posters, they were admonished to respect the campaign posters of the others, and they were required to give a campaign speech during a school assembly. Attendance by all students was mandatory. A guidance counselor, Barbara Ollis, assisted the candidates in the preparation of their speeches. She reviewed the speeches with each student, individually, and in the case of Dean Poling, instructed him to make certain changes. Ballots were printed and voting booths were rented. Students were taken out of English class to go to the polls.

The petitioner asserts that the Sixth Circuit opinion stretches the school-sponsored concept to the point that "every on-campus statement made during school hours or at school function is 'school sponsored' " and therefore the effect of the opinion is "students shed their First Amendment rights at the schoolhouse gates". This is nonsensical.

Even the dissenting opinion in *Hazelwood,* acknowledges that a campaign speech is a school-sponsored activity:

> As the second paragraph of *Fraser* evinces, if ever a forum for student expression was 'school-sponsored', Fraser's was:
>
> 'Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly.

> Students were required to attend the assembly or to report to study hall. The assembly was part of a *school-sponsored* educational program in self-government.'
>
> *Hazelwood* at 612 (Quoting *Fraser,* 478 U.S. at _____, 92 L. Ed. 2d 549, 106 S. Ct. 3159.)

There has been no misapplication of Supreme Court precedent. *Tinker* and *Hazelwood* present two separate questions and the facts of *Poling* are entirely consistent with *Hazelwood.* The students' free speech rights enunciated in *Tinker,* have not been shed at the courthouse door. *Tinker* does not apply.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE HAS BEEN NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

Dean Poling asserts that the district court granted summary judgment when the record contained substantial factual issues and that in doing so, the court applied a standard of whether or not the speech was "impertinent." The district court and the Sixth Circuit, both found that there were no disputes with respect to material facts. In addition, the standard applied by the district court was the standard applied in *Bethel.* The district court distinguished *Tinker* from *Bethel* and the case *sub judice.* With respect to *Hazelwood,* it had not been published at the time the court granted the respondents' motion for summary judgment.

Dean Poling also attacks the district court and the Sixth Circuit on the issue of due process because the district court held that due process does not require notice in a school setting; and because the Sixth Circuit faulted Poling for not requesting a hearing.

The Sixth Circuit held:

> We do not believe that Dean has shown any deprivation of 'life' or 'liberty' or 'property' within the meaning of this clause.
>
> This Court has heretofore held that '[t]he privilege of participating in interscholastic athletics . . . [is] outside the protection of due process.' *Hamilton v. Tennessee Secondary School Athletic Association,* 552 Fed. 2d 681, 682 (6th Cir. 1976). The privilege of participating in a student council election seems no different.
>
> *Poling v. Murphy,* No. 88-5538, at 14 (6th Cir. April 18, 1989) (25a).

Therefore, the Sixth Circuit held that Poling failed to establish entitlement to due process. The Court did state in *dictum* that it felt sure that based upon listening to the tape recordings of meetings between school officials and the *Polings*, that the board of education would have granted the Polings a hearing, if one had been requested. It is also true that counsel for the petitioner did request a hearing and that that request was denied. However, counsel for the petitioner omits in her argument that Dean Poling's father, Roy Poling, did attend a school board meeting, but that he failed to speak at the meetings—though there was ample opportunity.

The following is a brief summary of the hearings that Dean Poling and/or his father, Roy Poling, had with school officials concerning Dean's speech:

1. Immediately after the speech was delivered, Dean Poling, Ellis Murphy, Mr. Clark and Ms. Ollis discussed the contents of Dean's speech and the principal informed him that the speech was objectionable.

2. At 1:30 p.m. on the same day, the following individuals met for two hours: Principal Murphy, Ms. Ollis, Roy Poling and Dean Poling.

3. On Monday, May 11, 1987, at 4:00 p.m., Superintendent Wilcox, Roy Poling, Dean Poling and others attended a meeting of the Unicoi County Election Commission. Dean Poling was the topic of the meeting.

4. After the Election Commission meeting, Superintendent Wilcox and Mr. Poling discussed the matter further in the Superintendent's office.

5. On Tuesday, May 12, 1987, Superintendent Wilcox met with Mr. and Mrs. Poling, Dean, Attorney Ron Stromburg, Ms. Ollis, Principal Murphy and Superintendent Wilcox.

6. Roy Poling was invited to attend the school board meeting scheduled for May 14, 1987. The time of the meeting was changed from 6:00 p.m. to 5:00 p.m. and Superintendent Wilcox called Mr. Poling personally to inform him of the change. Mr. Poling appeared at the meeting, but did not speak.

7. The next Sunday, Superintendent Wilcox called Roy Poling to set up another meeting, and Mr. Poling was evasive. No further meetings were held.

8. Counsel Penny White was employed by the Polings and demanded a hearing before the School Board and upon the advice of counsel, this demand was denied.

CONCLUSION

As admitted by even the dissent in *Hazelwood*, a student's campaign speech is part of a school-sponsored activity. This Court has set forth the standard to be followed in cases such as this and the Sixth Circuit has applied that standard. The petitioner complains that there are disputed material facts making this case improper for summary judgment, and yet the petitioner fails to set forth any disputed fact which could be deemed material with respect to the application of the facts of this case to the law as set forth in *Hazelwood*.

For these reasons, the respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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